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situation grew up so gradually that the function of the Dean as a sort of father to the student body — the zealous and generous performance whereof shortened the years of Ames — was a crushing weight on the shoulders of Thayer, already called upon to bear heavy burdens in teaching and in molding new policies. While we are proud to think that the School could command the loyal, whole-hearted service of Ezra Thayer even at the cost of such a life, may we escape some feeling of humiliation? Was it necessary for a great university to put upon a highly organized, sensitive, conscientious nature the staggering burden of teaching, planning, and administering which fell upon him? It was a hard fate that sent him to the headship of the School at a time when the proportion of teachers to students had become too small, when the law was for a season in a state of fluidity, making teaching doubly difficult, when it had not yet been perceived that a large and heterogeneous body of students could not longer be dealt with by the direct contact and personal methods that had obtained in the past. It was indeed as if a race horse, having run his allotted course with all the skill and endurance that breeding and training had given him, were to be put for the rest of the day to pulling a plow.

"May his portrait urge upon those who remain and those who come after the duty of seeing to it that his devoted labors have not been in vain, of striving loyally that the passing of those who made the School what it was in the last century shall not mean the passing from these halls of what Maitland called 'the glory of Bologna, the glory of Bourges, and the glory of Harvard.'"

It is striking that the changes that Dean Pound sets forth should be taking place just as the School is completing the first century of its existence; but that striking thing is true, for the School was founded in the year 1817. A celebration of the centennial anniversary of that event, which is in preparation for next June, is hoped to give an opportunity as well for reunion meetings of many Law School classes as for the presentation of the School's work to the profession generally.

SUSPENSION OF SENTENCE. — An historical question of great practical application to-day has just been answered by the Supreme Court in a decision holding that federal courts have no power to suspend the sentence of a convicted person during good behavior.[1] There had been a split of opinion among the state courts as to whether the common law conferred on them this power.[2] In the absence of express legislation, the judicial power of the federal courts must be determined in the light of the common law and of the history of our institutions anterior to and at the adoption of the Constitution and with due regard to the long exercise of claimed power.[3] Down through the eighteenth century trial courts had no power to grant new trials, and the verdict was not reviewable upon the facts by any higher tribunal. To avoid error or miscarriage of justice, the courts were accustomed to suspend sentence for various reasons.[4]

[1] *Ex parte* United States, Petitioner, U. S. Sup. Ct., Oct. Term, 1915, No. 11 original. For a fuller statement, see RECENT CASES, p. 396.

[2] See 25 HARV. L. REV. 739.

[3] United States *v.* Reid, 12 How. 361; United States *v.* Nye, 4 Fed. 888. See 2 FOSTER, FEDERAL PRACTICE, 1615. The same construction has been applied in state courts. State *v.* Harmon, 31 Ohio St. 250, 258; Callanan *v.* Judd, 23 Wis. 343, 349.

[4] 2 HALE, PLEAS OF THE CROWN, c. 58, p. 412; 2 HAWKINS, PLEAS OF THE CROWN, c. 51 § 8; BLACKSTONE, COMMENTARIES, Book IV, c. 31, pp. 394–95; 1 CHITTY, CRIMINAL LAW, 2 ed., 758.

The extent of this practice is highly conjectural, because of a dearth of contemporaneous authorities. Blackstone says[5] that reprieves were granted *ex arbitrio*[6] *judicis*, either before or after judgment, for various reasons, as where the judge was not satisfied with the verdict, or considered the evidence suspicious. Often where the reprieve was granted because of extenuating circumstances, to enable a pardon to be sought or bestowed, the court refused to proceed further in the future, even though no pardon had been sought or granted. In 1809 (which is so proximate to the adoption of our Constitution as to be fairly indicative of the then-existing practice), Lord Ellenborough, a preëminent criminal jurist, released a convicted prisoner upon condition that he come up again for sentence when the court should desire it.[7] As the courts did not do this by virtue of any statute, their power must have been established by long-continued practice. But even though the power, as exercised in the principle case, was not so exercised by the courts at common law, this is not conclusive of the power of the courts to-day. The power to suspend sentence was established there; due allowance must be made for the development of its practice and its adaptation to changing attitudes and conditions.[8] Thus the federal trial courts, and those of many states, exercise, in the absence of any statutes, the power to grant new trials in criminal cases;[9] yet such power, except as to misdemeanors, has never been recognized in England.[10] Nowhere in our law has there been a more radical change of attitude than that of criminal legislation to offenders,[11] as is manifested by probation and juvenile statutes in many States.[12] It was in accord with this changing attitude that Justice Miller and other justices of the Supreme Court, while sitting on circuit, suspended sentence in many cases, a practice which has long been prevalent in many

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[5] See note 4, *supra*.

[6] This word is used in its original Latin sense, meaning "discretion" or "judgment."

[7] Rex *v.* Draper, 30 How. St. Trials 959, 1130. The power of the court seems not to have been questioned. This practice has continued in England. ARCHBOLD, CRIMINAL PLEADING AND EVIDENCE, 23 ed., 242. In 1887 the First Offenders Act, 50 & 51 VICT., c. 25, was passed, providing that the courts might release first offenders on their recognizance during good behavior. But this act was viewed as not conferring on the court any powers which it did not already possess. STEPHEN, CRIMINAL LAW, 5 ed., 17, n.; ARCHBOLD, 244. The Probation of Offenders Act, 7 EDW. VII, c. 17 *a*, which is much broader, was passed in 1907.

[8] "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." McKenna, J., in Weems *v.* United States, 217 U. S. 349, 373. "But the provisions of the Constitution are not mathematical formulas having their existence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." Holmes, J., in Gompers *v.* United States, 233 U. S. 604, 610.

[9] United States *v.* Keen, 1 McLean 429; United States *v.* Conner, 3 McLean 573; Commonwealth *v.* Green, 17 Mass. 515; State *v.* Prescott, 7 N. H. 287. See 1 BISHOP, NEW CRIMINAL LAW, 8 ed., § 1003, pp. 603–04.

[10] ARCHBOLD, 291. The Criminal Appeal Act, 7 EDW. VII, c. 23, in 1907, denied to the trial court the power to grant new trials in any criminal case.

[11] See SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT; HENDERSON, PREVENTIVE AGENCIES AND METHODS.

[12] See HART, JUVENILE COURT LAWS IN THE UNITED STATES. The Children's Act, 8 EDW. VII, c. 67, was passed in 1908. See HALL, THE CHILDREN'S ACT.

federal courts.[13] It would seem that this is a reasonable exercise of judicial power to attain a "lawful end."

The doctrine of separation of powers is said to be a further objection to the exercise by the judiciary of a suspensive power which it is thought trespasses on the pardoning power intrusted by the Constitution to the executive. A pardon reaches the punishment prescribed for the offense, and, perhaps, the guilt of the offender. Under a suspension of sentence both the conviction and the civil disabilities remain, and the prisoner may suffer eventually the prescribed punishment. Only in a narrow sense can the powers be said to be identical.[14] But to say that therefore the exercise of this power by the judiciary is unconstitutional is to adopt a strict, scholastic, and impractical view of the Constitution.[15] If the right to suspend sentence is part of the judicial power of courts, it is not probable that the framers of the Constitution intended that it be taken away by the grant of an analogous power to the executive, when the two powers existed side by side at common law.

As the right to suspend sentence is not so necessary a part of the judicial power of courts as to render their jurisdiction ineffective otherwise, it would be subject to the control of Congress.[16] In the principal case the statute[17] under which the prisoner was convicted provided for imprisonment for a minimum term of five years. By fair construction this enactment was not intended to affect the power to suspend sentence, as it merely required that the imprisonment, when suffered, should be of certain duration. It is unlikely that, if Congress intended to take away such an important power of the judiciary, it would have left its intent to be gathered by mere inference.[18]

The decision is especially unfortunate in that it denies to the federal judiciary a power which, where exercised, has proved highly salutary in its operation.[19] The trial judge has peculiarly first-hand knowledge of all the facts and extenuating circumstances. Appeals to the executive for clemency are difficult and expensive. Further, the suspension of sentence better protects society, as it reserves a check upon the prisoner, which is an incentive to good behavior in the future. The exercise of this

[13] See the opinion in the principal case. It has been exercised in the Massachusetts district for more than sixty years, and in numerous other circuits for many years. It was stated in the course of the argument that more than two thousand persons, then at large under suspended sentences, would be affected by the decision.

[14] See People *ex rel.* Forsyth *v.* Court of Sessions, 141 N. Y. 288, 294–95.

[15] "The attempt to make an exact analytical scheme of the powers of government according to this threefold division has failed. As actually drawn in America, the line is historical only in many cases." Pound, "Justice According to Law," 14 COL. L. REV. 1, 5 *et seq.* See GOODNOW, PRINCIPLES OF ADMINISTRATIVE LAW, 25–26. Thus the granting of amnesty or immunity by Congress has been upheld. Brown *v.* Walker, 161 U. S. 591. The practice, sanctioned by Congress, of granting remissions of pecuniary penalties and forfeitures by officers other than the President has been held constitutional. The Laura, 114 U. S. 411. Yet the power of the President to grant amnesty and to remit fines and forfeitures is undoubted. See 2 WILLOUGHBY, CONSTITUTION, §§ 688–89, pp. 1172–73.

[16] See 2 WILLOUGHBY, §§ 746–47, pp. 1267–69.

[17] Sec. 5209 U. S. REV. STAT.

[18] Statutes relating to crime must be interpreted in the light of the common law of crime. United States *v.* Carll, 105 U. S. 611.

[19] See People *ex rel.* Forsyth *v.* Court of Sessions, *supra*, 296; State *v.* Crook, 115 N. C. 760, 763, 20 S. E. 513, 514.

power, while discretionary, would not be arbitrary; where ordered unjustly or unreasonably, the suspension could be set aside.

While the language of the opinion of the Supreme Court denies the right of the courts to exercise the power to suspend either the imposition or the execution of a sentence, the scope of the decision is limited to the power to suspend the execution of an imposed sentence. It is possible to draw a distinction on the ground that the latter so closely resembles a pardon as to render its exercise by the courts unconstitutional, and yet the power to suspend the imposition of sentence be sustained. While the recognition of such a distinction by the Supreme Court would be fortunate, in that it would save to the courts much of this desirable power, yet on principle it would seem that the validity of the practice, in whichever form, must depend ultimately upon the same considerations.

It is hardly to be expected that the matter will be left as it is at present. The court intimates that the legislative power of Congress is adequate to meet the demands of the situation. It is submitted that the establishment of a board of probation, while helpful, would at most provide an expensive, cumbersome, and inadequate mechanism to meet the demands of the individual case.[20] Hence it is desirable that the legislation take the form of vesting in the courts themselves the power to suspend sentence indefinitely.[21]

PRACTICAL METHODS OF APPROACHING THE CONSTRUCTION OF WILLS. — Two distinctly different methods of approaching the construction of testamentary dispositions have become current.[1] The first, in vogue in most American jurisdictions, is the expression of a violent reaction against the over-technical and highly refined rules of construction so nicely employed by the common-law judges, the application of which often resulted in dispositions quite contrary alike to any intention the testator might have had, and to general notions of fairness, as was the case with the rule that "dying without issue" meant an indefinite failure of issue.[2] So the judges went to the other extreme, declaring that the testator's intention should control each case, and "that the mode of dealing with one man's blunder is no guide as to the mode of dealing with another man's blunder." [3] No doubt all this is true, if we know what the testator intended. But the courts have been influenced in no small degree by taking a fic-

[20] This is true because of the wide territory over which such a board would have to operate.

[21] The Act of July 25, 1910, 36 STAT. AT L. 864, established a probation system in the District of Columbia providing, *inter alia*, for the suspension of sentence by the courts.

[1] To what sources outside the four corners of the will the court may go for facts and circumstances, and what standard of interpretation it will apply, belongs to the science as distinguished from the practical art of construction. The science of construction determines what materials the court may use; the art of construction is the practical method the court employs in using these materials. It is of the former that Wigmore (EVIDENCE, Vol. IV), Thayer (PRELIM. TREAT. EVID.), and Hawkins (JURIDICAL SOC. PAPERS, II, 298) treat. The late Professor Gray, on the other hand, in THE NATURE AND SOURCES OF THE LAW, § 700 *ff.*, deals with the latter. See also, Holmes, "The Theory of Interpretation," 12 HARV. L. REV. 417; JARMAN, WILLS, Sweet's 6 ed., 503; Boyes *v.* Cook, 14 Ch. Div. 53 (1880).

[2] See GRAY, NATURE AND SOURCES OF THE LAW, § 701.

[3] *Ibid.*